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Coleman Karesh

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WILLS

COLEMAN KARESH*

Charges

Cases are frequent in which the question has arisen whether a testator has imposed a charge on land or personal property, usually the former,[1] but not so common are those dealing with the personal liability of a legatee or devisee of property charged. In *Meyerson v. Malinow*,[2] both of these aspects were considered. The testator's will gave his two sons all the capital stock of a close corporation and provided: "As a charge upon such stock * * * * I direct that my said sons pay to my wife * * * or cause to be paid to her by [the corporation] the sum of fifty dollars a week accumulated from my death, as long, during her life of widowhood, as she shall reside in Spartanburg County. No duty or responsibility with respect to the making of these payments to my wife is placed upon my executors as such, it being my expressed intention to confine this obligation personally to my sons against whose bequest of stock it is made a charge." The sons were children by a former marriage. They made the weekly payments of $50.00 for a time, and when the payments were discontinued the widow brought this action to require payment of past due and future installments. The sons filed an answer, substantially a general denial, and interposed a counterclaim for sums allegedly due them. Both the master and the circuit court found against the counterclaim and held the sons personally liable for the arrearages in the monthly payments. During the pendency of the action the wife died and the named plaintiff, her executor, was substituted.

The Supreme Court affirmed the action of the lower court. The contention of the sons was that a fiduciary relationship or trust had been created, but the court held that the provision

*Professor of Law, University of South Carolina.

1. Of which perhaps the best known in South Carolina are Laurens v. Read, 14 Richardson Equity 245 (S. C. 1868); Moore v. Davidson, 22 S. C. 92 (1884); Jaudon v. Ducker, 27 S. C. 295, 3 S. E. 465 (1885); Allen v. Ruddell, 51 S. C. 366, 29 S. E. 198 (1897); Dixon v. Roessler, 76 S. C. 415, 57 S. E. 203 (1907); Patterson v. Cleveland, 165 S. C. 266, 163 S. E. 784 (1932); Shired v. Nesbit, 90 S. C. 20, 72 S. E. 545 (1911); Mack v. Stanley, 190 S. C. 300, 2 S. E. 2d 792 (1939).

2. 231 S. C. 14, 97 S. E. 2d 88 (1957).

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in the will created a charge — which is obvious from the use of the term itself in the will — and that in a charge there is no fiduciary relationship between the holder of the property subject to the charge and the equitable encumbrancer.[3] The patent purpose of the sons' contention to this end was to assert that they were trustees and their liability, if any, limited to the bequeathed property or its value.

Following general authority, and specifically the South Carolina case of *Shired v. Nesbit*,[4] it was held that the acceptance of the property subject to the charge imposed upon the sons a personal liability to discharge the obligation, under the rule, as stated in the *Shired* case, that "one who accepts a devise coupled with an obligation binds himself by his acceptance of the devise to discharge the obligation." And the court quotes from 57 Am. Jur., 1010, the following: " * * * the weight of modern authority supports the conclusion that when a devisee accepts lands which have been charged with a legacy, he becomes personally liable for the payment thereof, unless, of course, the language of the will negatives any testatorial intention to charge the devisee personally. This rule, it has been said, rests upon the reasonable principle that he who takes a benefit under a will must take it subject to its provisions, so that the acceptance of the devise imports a promise to pay the legacy."[5] Because of the personal duty to discharge the obligation, liability extends to the amount of

3. Citing Restatement of Trusts, Section 10, which points out that an equitable charge is not a trust, although the interest of the beneficiary of a charge, like the interest of the beneficiary of a trust, is equitable. In the charge, the beneficiary has an equitable security interest; in the trust, the beneficiary has equitable ownership. Whether a trust or charge or condition has been created is a matter of interpretation; but, as indicated, there is no room in the will in question for anything but a charge. There are of course several vital distinctions between a trust and a charge, not the least of which is the matter of the statute of limitations: while ordinarily the statute is not applicable in the case of a trust (as between beneficiary and trustee), it is operative in the case of a charge. Dixon v. Roessler, 76 S. C. 415, 57 S. E. 203 (1907).

4. Note 1, *supra*.

5. The references to *devises* are of course not exclusive; and legacies, or personal property, may, as here, be charged. In most cases the payment of a legacy is made a charge upon property transferred by the will, but the obligation may not be to pay a legacy — which is what a testator gives — but for the transferee alone to make the payment. In such cases the testator himself makes no gift, or gives no legacy, to the beneficiary. That was expressly the case here. Typical of charges which are not imposed to satisfy legacies are those for support; the testator makes no provision for support out of his estate, but the devisee of property charged for the purpose must do so. Shired v. Nesbit is such a case; so also is Mack v. Stanly, note 1, *supra*.

the obligation and not to the value of the property, so that the testamentary transferee of charged property may find in a given situation that he is binding himself to pay more than the value of the property he has acquired — a case in which he would be the loser.[6]

ADEMPTION

Two cases involving ademption were before the court in the period under survey. Both treat the problem of ademption extensively, and coincidentally both deal directly or indirectly with the question of ademption of the proceeds of specific subject matter.

In *Watson v. Watson*,[7] the testator, by Item Three of his will, bequeathed, after a specific legacy, all the remainder of his personal estate to his wife. By the next item he devised all his real estate, described as 140 acres, more or less, in Greenville County, to his wife for life, with remainder to certain of his nieces and nephews. By Item Six he provided: "In the event I should sell any of my real estate, prior to my death, the proceeds therefrom shall go to my said wife for and during the term of her natural life, and at her death to my said nieces and nephews * * * . " Shortly after making the will the testator sold off 121 acres of the land and deposited the net proceeds of about $19,000 in a savings and loan association, receiving a certificate representing investment shares in that amount. He later withdrew $8,000 and therewith bought a house and lot — the consideration being $8,500, the source of the remaining $500 not being disclosed. Afterwards the testator sold the remainder of the 140 acres for $8,000, of which he deposited 7,500 in the same savings and loan association. A total of $900 was withdrawn for repairs to property and for personal use. On the testator's death $18,000 was on deposit to testator's credit, evidenced by certificate.

6. This is clearly indicated in Shired v. Nesbit. See in accord Annot., 116 A. L. R. 7, 19 (1938).

Since the whole matter is one of the testator's intention, it is possible for the testator both to make a charge and to impose personal liability, as in the usual case and in the Meyerson case. See, also, Morgan v. Smith, 59 S. C. 49, 37 S. E. 43 (1900), where both may be made subject to a condition precedent. The testator may create a charge, but not impose a personal liability. Scott on Trusts, Section 10.1. Or, "the testator may manifest an intention to impose a personal liability upon the devisee, if he accepts the property devised, but not to charge the land." Scott, *op. cit.* A case of this last kind seemingly is Kirkpatrick v. Chesnut, 5 S. C. 216 (1873).

7. 230 S. C. 247, 95 S. E. 2d 266 (1956).

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In this litigation the widow contended that she was entitled to the $18,000 deposit as personal property passing under Item Three, and that she was also entitled to a one-half interest in the house and lot purchased by the testator as after-acquired intestate property. The lower court's decision was adverse to her claims, and on appeal the Supreme Court affirmed.

The first contention of the appellant was that the term "any" in Item Four did not mean "all" and that since the testator had sold all his property, the clause was inoperative. This the court dismissed, saying that it was clear that the word "any" was intended to mean "all" as well.

The critical contention of the widow was that the sale of the real estate and the subsequent handling of the proceeds adeemed the gift *in toto*. The Supreme Court declined to accept this view, holding that the gift was of the proceeds of specific subject matter, as distinguished from a gift of the subject matter itself, and that since the proceeds were capable of tracing and identification there was not, under the authority of *Gist v. Craig*,[8] any ademption except to the extent of the money withdrawn from the deposit. The court differentiated this case from *Stanton v. David*,[9] on the ground that while in that case there was a gift of proceeds there was no segregation of funds or identification as here, nor was there any "provision in the will for the proceeds of anticipated sale in consonance with the devise, as in the instant case." It must be said, however, that in the *Stanton* case the stress was more on the question of when the will spoke than on the matter of identification. Since here the proceeds were converted into the deposit and into the house and lot, it was held that these items passed under item six to the wife for life, with remainder as provided.

If the proposition is accepted, as it manifestly must be under the *Gist* case, that a gift of proceeds is not adeemed if they are traced and identified,[10] the conclusion in the pres-

8. 142 S. C. 407, 141 S. E. 26 (1927), where testatrix directed her executors to collect certain notes and mortgages and pay over to a legatee, and the testatrix collected them herself, the proceeds being identified at her death. The general rule is in accord. Annot., 165 A. L. R. 1032 (1946).

9. 193 S. C. 108, 7 S. E. 2d 852 (1940).

10. Precisely what is required for tracing and identification is not clear. It is plain in this case and in the Gist case that particular property was the converted form of the proceeds and that they had been segregated from general assets, something impossible on both counts to show in the Stanton case. Suppose, however, that the testator, having

ent case is clearly sound. In truth, the case is even stronger than in the type of situation represented by the *Gist* case, since there the testator makes no specific disposition of the proceeds in the event he should dispose of the property during his lifetime — the law making it for him —, whereas in this case the testator made specific provision for the disposition of the proceeds in the contingency of sale by him. Of course, if there is a specific legacy which is the subject of a gift, its sale adeems the legacy and the proceeds or other property given in exchange or acquired with the proceeds are not substituted;[11] but where the testator himself makes the substitution, he himself guards against the revocation or ademption that might otherwise occur. The argument of course for ademption was not so much that the devise of the land had been revoked or adeemed, but that the gift of the proceeds had been, because the proceeds thereunder had taken a new form and in their new form did not answer the description in the will. But any such construction is almost self-defeating and would make the clause in question meaningless, since, unless the proceeds are cash which is retained in specie, or an uncashed check, or property given in exchange, the proceeds almost invariably are converted. In the usual transaction, where the proceeds are represented by check of a purchaser, the deposit of the check itself converts the form of the proceeds into a debt of the bank to the depositor.

The terms "revoked" and "adeemed" have been used above by the writer, it should be noted, more or less interchangeably, but the former term has been employed because of the fact of a *devise*. It is interesting to observe the comments of Mr. Chief Justice Stukes, writer of the opinion, on the use of these terms, so interesting in fact as to warrant setting them out in full as a valuable contribution to the history of the law of wills:

"The terms adeem and ademption have been used by court

sold the property, deposited the proceeds in a bank account already standing in his name, so that there was commingling. There would be tracing but hardly identification. In the field of trusts that fact has not presented any difficulty, and, subject to the rules as to withdrawals, a trust claim can be asserted against the fund to the extent of trust money so deposited. See Wulbern v. Timmons, 55 S. C. 456, 33 S. E. 568 (1899); Patterson v. Jones, 99 S. C. 128, 82 S. E. 1008 (1914); White v. Bank, 60 S. C. 122, 38 S. E. 453 (1900). Of course no trust is involved in the ademption cases, but it would seem that the analogy as to mixing funds is appropriate.

11. Annot., 3 A. L. R. 1497 (1919), see also Rikard v. Miller, 231 S. C. 98, 97 S. E. 2d 257 (1957), next reviewed.

and counsel in this case as applicable to legacies and devises, which is contrary to the early cases where the doctrine which they denote was held applicable only to bequests, not devises. 1 Bouvier, Rawle's 3rd Revision, 134. 69 C. J. 1001, Wills, Sec. 2201. Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716. Godbold v. Vance, 14 S. C. 458. Cf. Hunter v. Mills, 29 S. C. 72, 6 S. E. 907, 911, where it was said: "It seems to us that, somewhat like an 'adeemed' legacy, it [a devise] must simply go out of the will.'[11a] However, apparently beginning in this country with the case of Hansbrough's Ex'rs. v. Hooe, 12 Leigh, 316, 39 Va. 316, 37 Am. Dec. 659, later decisions have applied the doctrine *eo nomine* to devises of realty as well as bequests of personalty. But in the case at bar there was no ademption, except in part, in either of the meanings of the term because, perforce, Item VI of the will and the segregation by the testator of the funds devised from the sales of his lands, the gift was not taken away. The terms are devised from the Latin, ademptio, which means a taking away."

If these remarks are to be taken as a judicial substitution of "ademption" for "revocation" in the case of devises, then indeed is it "a consummation devoutly to be wished," not only because the result is the same where the gift, whether of land or personalty, is taken from the beneficiary, but because the law elsewhere uses the single term "adeem."[12]

11a. See a similar expression in reverse in Long v. Weir, 2 Richardson Equity 283 (S. C. 1846), where testator bequeathed a slave to the plaintiff and afterwards gave the slave to defendant's wife: "The gift to the defendant's wife was an ademption of the legacy to complainant; and, as to that, operates as a revocation of the will."

12. But until this decision, despite the trend, the South Carolina cases speak of the withdrawal of the devise as revocation. One of the earliest cases is Haynesworth v. Cox, Harper Equity 117 (S. C. 1824), where it is said "It has been solemnly settled that a sale of land, after a devise and before the death of the testator, is a revocation of the devise; and the money on the sale thereof becomes personal estate and is distributed, or passes under the residuary clause, under the facts of the case." Other cases holding that a conveyance *revoked* or would revoke a devise: Thompson v. Thompson, 2 Strobhart Law, 48 (S. C. 1847); McFadden v. Lumpkin, 112 S. C. 431, 100 S. E. 168 (1919); Godbold v. Vance, 14 S. C. 453 (1880), cited in the decision; Clinton v. McKeown, 39 S. C. 21, 17 S. E. 504 (1892); Gable v. Rauch, 50 S. C. 95, 27 S. E. 555 (1897); Hunter v. Mills, 29 S. C. 72, 6 S. E. 907 (1888), cited in the decision; Pinson v. Pinson, 150 S. C. 368, 148 S. E. 211 (1928) holding devise revoked by subsequent contract of sale by testator; Stanton v. David, note 9, *supra*; Drake v. Drake, 148 S. C. 147, 145 S. E. 705 (1928). On related questions, where doctrine of revocation acknowledged, see Schmidt v. Schmidt, 7 Richardson Equity 201 (S. C. 1855), transfer of devised land for purposes of security not operative as revocation; Douglass v. Dickson, 11 Richardson Law 417 (S. C. 1858), contract by testator to sell devised land does not revoke authority to executors to effect division, and executors may carry out contract.

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Then, too, the adoption of the single term would remove the awkward posture which appears in many revocation cases dealing with the question of whether there can be such a thing as "implied revocation" or "revocation by circumstances," the courts declaring that, in the presence of the revocation statutes,[13] there can be no revocation by implication but only revocation under the statutes,[14] and explaining away the term "revocation" when the land devised had been disposed of by the testator as "revocation from necessity."[15]

But if "ademption" will, as a result of the decision, take the place of "revocation" for devises, it by no means follows that the statement of the Chief Justice that the doctrine of ademption was held to be inapplicable to devises must now be taken as no longer true, or that the revised statement should be "the doctrine of ademption applies to devises." The reason is that "ademption" is used in two senses: one in the sense in which it has heretofore been employed — extinction, withdrawal, alienation or disappearance of the subject matter; and the other in the sense of satisfaction, whereunder a legacy is treated as satisfied — and on that account adeemed or taken out of the will — by payment or other gift to the legatee.[16] There is an important distinction between the two types of ademption even in those states where ademption by alienation applies to devises: in the vast majority of jurisdictions the doctrine of ademption *by satisfaction* does not apply to devises — that is to say, a devise cannot be satisfied by subsequent transactions short of a conveyance to the devisee himself, no matter what the intention.[17] The South Carolina cases are squarely in keeping with this

13. NOW CODE OF LAWS OF S. C., 1952 §§ 19-221, 19-222.

14. Verdier v. Verdier, 8 Richardson Law 135 (S. C. 1815); Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716 (1879); Scaife v. Tompson, 15 S. C. 337 (1880); Prater v. Whittle, 16 S. C. 40 (1881); Gregg v. McMillan, 54 S. C. 378, 32 S. E. 447 (1898).

15. Prater v. Whittle, 16 S. C. 40 (1881).

16. 4 PAGE, WILLS, §§ 1533 *et seq.* (3rd Ed. 1941); Annot., 26 A. L. R. 2d 9 (1923); Guignard v. Mayrant, 4 DeSaussure Equity 614 (S. C. 1816); Richardson v. Richardson, Dudley Equity 184 (S. C. 1838); Allen v. Allen, 13 S. C. 512 (1879); Godbold v. Vance, 14 S. C. 458 (1880); Gregg v. McMillan, 54 S. C. 378, 32 S. E. 447 (1898). Whether satisfaction, wholly or *pro tanto*, takes place is a matter of intention, but the intention of the testator in subsequent acts or conduct plays no part in ademption by extinction. Rogers v. Rogers, 67 S. C. 168, 45 S. E. 176 (1903).

17. 4 PAGE, WILLS, § 1549 (3rd Ed. 1941); ATKINSON, WILLS, Section 133 (2nd Ed. 1953).

view,[18] and it is primarily in this sense that they declare the principle that "the doctrine of ademption does not apply to devises of real estate." These cases are of course not overturned by the decision in the case under review, and inferences drawn from the discountenancing of "revocation" as a suitable term and the approval of "ademption" must be restricted to only one of the senses in which that latter term is used. At best the conclusion that must be drawn is that a devise, like a legacy, may be adeemed by alienation, but that a devise may not be adeemed by satisfaction, even though the distinction is logically not a sound one.[19]

The second of the ademption cases before the Supreme Court in the period under survey is *Rikard v. Miller*.[20] The action was brought for construction of a will. After providing for payment of his debts, the testator gave a legacy to a grandson, and by the next, the third, item of his will gave his wife his residence together with "whatever automobile for personal use I have at the time of my death, together with all monies and all personal property left after payment of the specific legacies and bequests herein and all my debts." The fourth, and here the crucial, item gave "my business called 'Miller's Termite Control', including trucks, equipment, stock and good will * * * to be equally divided among my children living at the time of my death, and among the child or children of any deceased child of mine, other than my grandson James Bruce Miller, such child or children to take the share

18. Godbold v. Vance, 14 S. C. 458 (1880); Allen v. Allen, 13 S. C. 512 (1879); Gregg v. McMillan, 54 S. C. 378, 32 S. E. 447 (1898).

19. 3 AMERICAN LAW OF PROPERTY, Section 14.13 (1st Ed. 1952).
The case that Mr. Chief Justice Stukes cites as originating the change in this country — Hansbrough's Ex'rs v. Hooe, 12 Leigh 316, 39 Va. 316, 37 Am. Dec. 659 (1841) — holds that a devise may be adeemed by subsequent advancements, and stands more for this proposition than for refutation of a distinction between ademption and revocation.
It has been stated that the reason why revocation applied to devises — and ademption did not — where the property was alienated was bound up with the rule against the devising of after-acquired real estate, and that with the elimination of the rule by statute in the various states the reason against ademption ceased. Page on Wills, Sec. 1489; American Law of Property, Sec. 14.13. The common law rule in South Carolina that after-acquired real property could not pass by will was abolished by statute in 1858, under what is now Sec. 19-231 of the 1952 Code, and if the rule was the justification for revocation in opposition to ademption, its elimination should serve as a further, though technical, ground for the substitution. Nevertheless, all the South Carolina cases since 1858 have spoken of revocation, without, however, adverting to the possible effect of the statute in terms of substitution of expression or doctrine. See note 12, *supra*.

20. 231 S. C. 98, 97 S. E. 2d 257 (1957).

of the deceased parent. In case there are no monies left in my estate at the time of my death, my automobile and other personal property hereinabove bequeathed to my wife shall be sold for the payment of my debts and the legacy to James Bruce Miller, the business called 'Miller's Termite Control' not to be subject to the payment of my debts and legacies in the remaining items of the within will, until other personal property has been exhausted."

The testator was twice married, his second wife being the wife mentioned in the will. The children were children of his first marriage.

Shortly before his death the testator sold the business referred to in the fourth item for $25,000, of which $4,000 was paid in cash and the remaining $21,000 was represented by a note and chattel mortgage, a part of his estate at his death. The contention of the wife was that the bequest had been adeemed by the sale and that the proceeds, both cash and security, had passed to her under the residuary third item. The contention of the children and grandchildren was that ademption had not taken place, but that if it had the proceeds of the sale passed as intestate property. The lower court held for the wife in both respects — that there had been an ademption and that the proceeds went to her. The Supreme Court held that ademption had taken place but reversed as to the disposition of the proceeds of sale — holding that they passed as intestate property. (This phase of the case will be discussed under the heading of "Lapse and Residue" hereafter). In sustaining the lower court's determination that ademption had occurred, the Supreme Court rejected the argument of the appellants that from the will's language and because of the nature of the legacy and other factors the executor was impliedly directed to sell the business and that there was thus a gift of proceeds which, being identifiable, would not be adeemed by the testator's sale. The court, recognizing the rule in *Gist v. Craig,* fortified by *Watson v. Watson,* just discussed, declared that this case was unlike the two mentioned, in that the will did not show that "the testator contemplated any change in the form of the bequest or legacy, nor does it show that he intended to pass the proceeds in the event he disposed of such business." This, then, being a specific legacy of designated subject matter, and not of its proceeds, there was ademption *in toto,* the court noting that "it has been

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said that in the case of specific gifts of property, the nonexistence of the property at the death of the testator, or its consumption, loss, disposal by sale, gift or other alienation, during the lifetime of the testator, works an ademption of the legacy."

Lapse and Residue

Under this heading are cases in which the question has been as to whether a gift has lapsed — using the term in the broad sense of failure from any cause instead of the more limited sense of failure because of the death of a legatee or devisee during the testator's lifetime — and as to its disposition if there has been a lapse: whether as intestate property or into a residuary clause. The further, and related, question is as to the scope of residuary clauses, not limited to their possible function of catching lapsed gifts but other property as well.

In *Padgett v. Black*,[21] the question of lapse and ultimate disposition arose under a will which gave property to a beneficiary who was dead at the time of the making of the will. The disposition was in the general residuary clause of the will which provided that the residuary estate be divided into eight equal shares, the last part reading: "One eighth (⅛) part to be paid to the child of my deceased sister, Elizabeth B. Padgett, to him absolutely and forever." The beneficiary was dead when the will was made, and that fact was known to the testatrix. The plaintiffs were the only children of the deceased beneficiary, and their contention, in this action to construe the will, was that they were the intended beneficiaries under the quoted section. The lower court agreed with this contention, reaching its conclusion by findings, in the language of the opinion, "that the testatrix knew at the time of the making of her will that the only child of her deceased sister, Elizabeth B. Padgett, had died about three years before and that the plaintiffs were the only children of such child; that she did not intend to die intestate; that she intended by item four of her will to distribute the residue of her estate; that she intended for the eight branches of her immediate kindred each to take one-eighth part in the residue; that no branch would receive a greater amount than any other branch of the family; that if the one-eighth part designated to the son of Elizabeth B. Padgett is invalid, then this branch of the family would take nothing and defeat her manifest in-

21. 229 S. C. 142, 92 S. E. 2d 153 (1956).

tention that this branch should be represented * * * and that the general scheme of the will was such that the testatrix intended that the children of Oliver W. Padgett, Sr., should take their father's part." The decree, as a reading of the transcript of record will show, concurred in the plaintiffs' position on two grounds, either alternative or cumulative: (1) that the plaintiffs were substitutional beneficiaries; (2) that, on applying the will, it being ascertained that the beneficiary named was dead and that the testatrix knew it, a latent ambiguity arose as to the meaning of the terms employed, which, under the extrinsic facts, would be resolved into a conclusion that the plaintiffs were the original beneficiaries under the description in the controversial clause. The briefs of the parties were directed to both of these aspects of the case. On appeal the lower court was reversed. In an informative review of the authorities, the court followed the rule that a gift to a beneficiary dead at the making of the will is void *ab initio*, even though the fact was known to the testator; that lapse or failure was not prevented by the anti-lapse statute,[22] which applies only to gifts to children and which in any event does not operate where a legatee is dead when the will is made; and from a reading of the whole will that there was no substitutional provision which would guard against the failure of the gift. The authorities urged by the claimants in support of the substitutional contention were distinguished, particularly the cases of *Dent v. Dent*[23] and *Ex Parte Newton*,[24] where gifts to legatees that might otherwise have lapsed because of their deaths before the testator were saved by codicils which were designed to substitute beneficiaries.[25] The conclusion reached by the court is clearly sound, although it is perhaps to be regretted that it did not, in the opinion, take note of the constructional problem raised in the pleadings, briefs and decree — namely, whether there

22. CODE OF LAWS OF S. C., 1952, § 19-237.
23. 113 S. C. 416, 102 S. E. 715 (1919).
24. 183 S. C. 379, 191 S. E. 59 (1937).
25. These two cases, while different on the facts from the present case, are not in themselves the healthiest of cases. Of course a codicil made after a legatee has died, of which fact the testator is aware, presents a much stronger case for substitution than where there is no codicil and the legatee is dead when the will is made; the fact of death may be, and probably was, the occasion or reason for the codicil — something which could not be true as to the making of the will. The mere fact, however, that a codicil has been made after a legatee has died will not prevent a lapse. See Coffin v. Elliott, 9 Richardson Equity 244 (S. C. 1857) where testatrix apparently knew of legatee's death.

was a latent ambiguity or erroneous description in the clause which could be resolved in favor of the claimants. The court may have regarded this position of the claimants or the trial judge as too tenuous to deserve consideration, and in any event it would seem that there was neither a patent nor latent ambiguity to justify giving to the words used any other than their plain meaning.[26]

Having concluded that the gift had lapsed or was void the court held that the failure having occurred in the residuum itself, the interest passed as intestate property, under the rule announced in *Davis v. Davis*:[27] "To the rule that a general residuary clause will carry lapsed or ineffectual bequests of personal property, and also devises of real estate, there is the exception that lapsed or ineffectual legacies or devises of a portion of the residuary estate itself, where the residuary clause is to several devisees or legatees in common, do not inure to the benefit of the residuary legatees or devisees, but the interest of the deceased becomes intestate estate and as such passes to the next of kin or heirs at law of the testator."

The case of *Watson v. Wall*[28] which deals with the question of renounced devises and their disposition is discussed in detail under the subject of Trusts, and there the essential facts

26. The respondents argued simply that "When the testatrix said: 'to the child of my deceased sister, Elizabeth B. Padgett, to him absolutely and forever,' she intended to say 'to the grandchildren of my deceased sister, Elizabeth B. Padgett, to them absolutely and forever.'" (f. 28, brief of respondents). The trouble with this argument is that the will does not say so, and what the testatrix intended to say but did not cannot form a part of the will. The function of interpretation is to ascertain the *meaning* of the words used, and, in the language of the older cases "any evidence is admissible which tends to explain and apply what the testator has written; no evidence is admissible to show what he intended to write." McCall v. McCall, 4 Richardson Equity 447, 455 (1852). A conjecture that the testatrix and her draftsman did not intend a nugatory gift is of course reasonable: common sense would tell her that she could not give property to a dead person, and her lawyer, not only exercising common sense but knowing the law, would likewise be aware of the futility of such a gift; and as a further application of common sense, if the intention was to give to the respondents it would have been the easiest thing, and the most natural, to say it in so many plain words. Without going outside the record, the probability is that there was forgetfulness on the testatrix's part: in forgetting the fact at the time or in forgetting to tell her lawyer of the fact. On the other hand, there are other possibilities, and the clause may have been the result of some idiosyncrasy or some stubborn insistence, or the inadvertent or deliberate repetition of the same clause in an earlier will made when the beneficiary was alive, and to which the present will was not a codicil.

27. 208 S. C. 182, 37 S. E. 2d 530 (1946).

28. 229 S. C. 500, 93 S. E. 2d 918 (1956).

are set out. The elements pertinent here are those relating to the devises renounced by the State of South Carolina and the County of Marion. The original parties in the suit had "conceded," and it was so adjudged, that these devises passed as intestate property. The Attorney General intervened on leave of the Supreme Court and contested the correctness of the ruling. He was successful in this effort. The court below had apparently concluded that there was no residuary clause to catch the devises. The Supreme Court's holding, in reversing, was otherwise, the court concluding that "no particular language is required to effect disposition of the entire residuum of the estate," and that items three and ten of the will were, in effect, general residuary clauses and the devises so renounced passed into item three and the surplus of income in that item thereupon passing into item ten. But in reaching this conclusion the court had first to dispose of a troublesome case which seemed to hold, contrary to the general rule,[29] that a renounced gift, unlike a lapsed gift, could go only as intestate property. This was the early case of *Richardson v. Sinkler*,[30] which held that a legacy, subject to conditions, which the legatee refused to accept because of the conditions, passed as intestate property despite the presence of a general residuary clause, the court saying (p. 138) "because they are expressly bequeathed to * * * [legatee] on certain conditions, and not being bequeathed over in case of his refusal to accept them, they must be considered as part of the testator's personal estate undisposed of and distributable." It is not clear whether the decision is based on the presence of the conditions or on the mere fact of refusal, but, aside from whatever superficial distinctions there were in the two cases, the court in the present case rejected the notion in the *Richardson* case — thereby practically overruling it — that a renounced gift must pass as intestate property. The court professed to see no distinction between a lapsed and a renounced gift in the light of the functions of a residuary clause and held that equally applicable to a renounced gift is the rule on lapsed gifts: "The rule that a lapsed devise or bequest passes under the general residuary clause is founded not upon the assumption that the testator foresaw the possibility of lapse, but

29. 57 AM. JUR., *Wills*, Secs. 1447, 1573 (1948), cited by the court. See, also, as supporting the general rule that renounced gifts go into a general residuary clause, unless the contrary intention is shown, Annot. 155 A. L. R. 1420 (1945).

30. 2 DeSaussure Equity 127 (S. C. 1802).

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the presumption against partial intestacy[30a] * * * and the corollary that, unless a contrary intention is apparent, the general residuary clause is to be construed as including all of the estate not otherwise effectually disposed of * * * [and] presumably the testator intended to take away from the residuary, only for the benefit of the particular, legatee." The court pointed out that nothing in the will indicated an intention to have the property go to the heirs, whom he had already provided for, in the event of a renunciation, and this being so the general rule, which it was thus accepting, would cause the renounced devises to pass as residuary estate.

The remaining case under this heading, *Rikard v. Miller*,[31] has been discussed under Ademption, and the essential facts and terms of the will are there set out. The lower court and the Supreme Court had found that ademption had taken place, but the Supreme Court reversed the lower court's holding that the proceeds of the adeemed gift had passed to the wife. The lower court's action was based on the view that item three of the will was a general residuary clause. The Supreme Court's view was that the item was a restricted or limited residuary disposition into which the proceeds did not go, and that they passed as intestate property. This conclusion was based on a reading of the will as a whole. The court denied that the term "personal property" in Item three was intended to be used in a comprehensive sense, and stated that "while the term 'personal property' in its broadest legal signification, includes everything which is the subject of ownership, except lands or interest in lands, we think here it was used in a more restricted sense as including only goods and chattels for personal use,"[32] noting that the testator intended to have the business go to his children and grandchildren in-

30a. Even with a general residuary clause in a will, the early law was that lapsed *devises* would pass only as intestate property. Cheves v. Haskell, 10 Richardson Equity 534 (1859). The rule was based on the conception that a will of real estate spoke as of the time of its execution, and as such was tied in with the rule as to after-acquired real property. With the abolition of the rule as to after-acquired real property in 1858, by what is now Sec. 19-231 of the 1952 Code, in effect making a will of real property speak as of the time of death, it became possible, and is now the law, that lapsed devises, like lapsed legacies, can fall into a general residuary clause. Cureton v. Massey, 13 Richardson Equity 104 (S. C. 1866); Johnson v. Harrellson, 6 S. C. 336 (1875).

31. 231 S. C. 98, 97 S. E. 2d 257 (1957).

32. Citing Gist v. Craig, note 8, *supra*, and Quick v. Owens, 198 S. C. 29, 15 S. E. 2d 837, 137 A. L. R. 201 (1941), where the term was regarded as used in a restricted sense, the court in each case being aided by the rule of *ejusdem generis*.

tact (a purpose which he later defeated by its sale) and that the business was not to be sold for payment of debts and legacies until all other personal property had been resorted to. The court also considered the technical aspects of the language and place of the residuary clause, noting that "the terminology used in item three is not that ordinarily found in a general residuary clause.[33] Also to be noted is that this clause excludes the property bequeathed in other portions of the will.[34] Ordinarily such a provision is inserted at the conclusion of the instrument.[35] * * * All of these circumstances, while not controlling, may properly be considered in determining the nature of a residuary clause. The question after all is the intention of the testator as evidenced by the language used when considered in connection with the entire will."

As is usual in cases dealing with the question whether a residuary clause is restricted or general, the court had to cope with the presumption against partial intestacy — a presumption which is one of the prime supports of a general residuary clause.[36] The court pointed out that it did not overlook the presumption, but stated "it is also not to be presumed that the testator intended to disinherit his children."[37] Though stated in the negative, this seems to be declaring a presump-

33. Note dictum in Haynsworth v. Cox, Harper Equity 117, 122 (S. C. 1824), where the court said: "If the testator intended to make a general residuary bequest to his brother, why not say more simply and in the usual way, 'I give all the rest and residue of my estate to my brother * * * .' This is a most salutary admonition. But on the other hand, as hereinbefore observed in Watson v. Wall, "no particular language is required to effect disposition of the entire residuum of the estate," and see similar language in Lopez v. Lopez, 23 S. C. 258 (1885), where the words were "the balance of my estate."

34. See Swinton v. Egleston, 3 Richardson Equity 201 (S. C. 1851), where the language was "I desire that all the property not specified in this will" and it was held that a bequest to a slave which failed because of the inability of the slave to take passed into the quoted clause under the general rule that a general residuary clause catches property not effectually disposed of as well as property not disposed of.

35. See Lopez v. Lopez, 23 S. C. 258 (1885) at p. 270, as to the position of the residuary clause: "We cannot suppose that the character or capacity of the seventh clause is changed in any way by being in the body instead of at the end of the will. It would probably strike a lawyer that the orderly method of proceeding would be to set down first the provisions giving specific property, and then the clause intended to cover everything that might remain undisposed of; but it is believed that the relative position of the different clauses is purely arbitrary."

36. See Watson v. Wall, 229 S. C. 500, 93 S. E. 2d 918 (1957), hereinbefore discussed.

37. It is to be noticed, however, that the testator did not disinherit his children, having given them and his grandchildren his business by item 3, and if the residuary clause had been unambiguously general they would have been disinherited — not by the will, but by his own subsequent act.

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tion against disinheritance,[38] and, if so, it is apparently, so far as the writer knows, the first time it has been announced in the state,[38a] although it is not unrelated to the construction which favors the natural objects of a testator's bounty.[39] In keeping with its statement the court quotes from Page on Wills:[40] "Where a residuary clause is capable of two constructions, one of which making it a general residuary clause will result in the exclusion of the testator's heirs, and the other of which making it a particular residuary clause, will leave a provision for testator's heirs under the intestate laws, that provision will be preferred which leaves a provision for the heirs."[41] And, finally, to indicate that it is not overwhelmed by the presumption against intestacy, the court directs attention to *Charleston Library Society v. C. & S. Bank*,[42] where the court, after observing that the presumption against intestacy is a rule of construction, declared that "the mere fact that there is a residuary clause or other clause to prevent intestacy does not in itself show that a particular devise or bequest was intended by the testatrix to pass under the residuary clause."

38. The presumption against disinheritance, which is not limited to children, is commonly accepted elsewhere. See 2 PAGE, WILLS, Sec. 928 (3rd Ed. 1941): "In construing a will the presumptions on the subject of disinheritance must be carefully balanced against those upon the subject of partial intestacy, since the two are inconsistent in form. Every reasonable construction in the will must be made in favor of the heir; and he can be disinherited only by words which produce that effect clearly and necessarily, either by express terms or by necessary implication. Any ambiguity will be resolved in favor of the heir. * * * The presumption against intestacy is of no greater force than the presumption in favor of the heir. The presumption in favor of the heir is of no greater force than the presumption against intestacy." See, also, to the same general effect 57 AM. JUR., *Wills*, Secs. 1160, 1161 (1948); 95 C. J. S., *Wills*, Sec. 616 (1957); and as to construction in favor of children and widow, 95 C. J. S., *Wills*, § 617 (1957).

38a. There is a suggestion of it in the court's approval of a catalogue of rules in the argument of counsel in Davenport v. Collins, 161 S. C. 387, 428, 159 S. E. 787 (1931), one of them being "The law favors the construction most nearly in conformity with the statute of distributions."

39. Lemmon v. Wilson, 204 S. C. 50, 28 S. E. 2d 792 (1944).

40. Sec. 928, p. 856, Lifetime Edition. The excerpt quoted is under a section headed Presumption Against Disinheritance and is given as an illustration—which implicitly is a recognition of the presumption by the court.

41. This would necessarily have to be qualified somewhat where the residuary taker is, as here, herself an heir; and as a widow is favored, it would be doubtful that a construction would be given in favor of collateral heirs.

42. 200 S. C. 96, 20 S. E. 2d 623 (1942).

Abatement

The case of *Gaither v. U. S. Trust Co.*[43] involved the question of what property an executor might, under the terms of the will, use in discharging debts and estate and inheritance taxes. While the case essentially is one of the substantive law of wills — namely, the matter of abatement — the tax features overshadow, although they flow from, the substantive aspects of the litigation; and because of its tax importance, the case is reviewed at length in this survey under the head of Taxation. From the perspective of Wills it is desirable to set out, repetitively, the pertinent facts and the relevant portions of the will in controversy.

The plaintiff, husband of the testatrix, brought this action for construction. Item I of the will provided: "I direct my executor hereinafter named to pay all my just debts, last illness and funeral expenses, together with all taxes, State and Federal, of whatever nature and kind, from cash on hand or in Banks or such as shall come into his hands during the administration of this will or from the sale or exchange of any bonds, stocks or debentures of which I may be seized and possessed if there is not sufficient cash." Item II bequeathed to United States Trust Company of New York, defendant and respondent, "all stocks, bonds, debentures now in its possession and now handled by them for me under an Agency Agreement, in trust * * * *" with specified powers and for the benefit of the husband and her daughter for their lives, the corpus payable to grandchildren. By item III the testatrix bequeathed to her daughter personal effects, furniture and jewelry. Item IV provided: "All the rest, residue and remainder of my property, real, personal or mixed, wherever situated, located or found, I will, devise and bequeath to my husband, H. Granger Gaither."

The value of the estate was $816,000. The securities held by the trust company were valued at about $635,000. The bonds and stocks in the testatrix's possession were valued at about $160,000. The other assets of the estate, consisting of cash, real estate and various items of personal estate, were valued at about $20,000. Debts, estate and inheritance taxes amounted to about $250,000. Since the property falling into the residuary estate was less than debts and taxes, there would be no residuary estate after its applica-

43. 230 S. C. 568, 97 S. E. 2d 24 (1957).

tion to these items unless the will provided an order of abatement that would produce a different result. The husband argued that there was such a direction in the will or at least an authorization which permitted him to sell any of the securities of the estate for the purpose of producing cash and that he was not required to exhaust the securities in the residuary estate. The lower court and the Supreme Court alike rejected the husband's contention, holding that he should first exhaust the residuary property before resorting to securities in the hands of the trust company.

The Supreme Court reached its conclusion on certain well established principles: that, unless otherwise prescribed by the will, residuary property is first to be applied to the payment of debts and as between general legacies and specific legacies the former abate first;[44] that the order prescribed by law may be changed by the testator;[45] that these principles are applicable to estate and inheritance taxes, and that the "testator may designate the funds or property which shall be burdened with taxes and free any and all other gifts from diminution by estate or inheritance taxes;"[46] and that * * * "where there is a general direction to the executor to pay all debts, costs of administration and taxes, there is an implied direction that the taxes are to be paid from the fund which also bears the burden of debts and expenses of administration" (citing cases from Connecticut, Wisconsin and Virginia.) The court then characterized the legacy of trust se-

44. Citing Warley v. Warley, Bailey Equity 397 (S. C. 1831); Brown v. James, 3 Strobhart Equity 24 (S. C. 1849); Duncan v. Tobin, Dudley Equity 161 (S. C. 1838). To which may be added, as to the prior resort to residuary estate, Miller v. Mitchell, Bailey Equity 437 (S. C. 1831); Jenkins v. Jenkins, Cheves Equity 129 (S. C. 1840); Gist v. Craig, 142 S. C. 407, 141 S. E. 26 (1927). The proposition is of course implicit in the many cases concerned with the question of whether land in a blended residue of real and personal property is implicitly charged with the payment of legacies. Although residuary legacies are generically general legacies, and general legacies abate ratably in the absence of contrary intention, residuary legacies abate before other general legacies. Even if the gift of the trust securities had been general rather than specific, it would have abated after the residuary gift. See Jenkins v. Jenkins, *ante*; Miller v. Mitchell, *ante*; Smith v. Heyward, 115 S. C. 145, 104 S. E. 473 (1920).

45. Citing Pell v. Ball's Ex'rs, Speer Equity 518 (S. C. 1844); Drayton v. Rose, 7 Richardson Equity 328 (S. C. 1855); 57 Am. Jur., Wills, Sec. 1468. To which may be added, among others, Pinckney v. Pinckney, 2 Richardson Equity 218 (S. C. 1846); Hull v. Hull, 3 Richardson Equity 65 (S. C. 1850); Hammett v. Hammett, 38 S. C. 50, 16 S. E. 839 (1892); White v. Vaughan, 2 Hill Equity 329 (S. C. 1835); S. C. Nat. Bank v. Bates, 175 S. C. 168, 178 S. E. 611 (1934).

46. Citing Patterson v. Cleveland, 165 S. C. 276, 163 S. E. 788 (1932).

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curities as specific, because it was separated and easily identifiable, and "unless the testatrix directed otherwise, they could not be used to pay debts and taxes until the personal property passing under the general residuary clause was exhausted."[47] The court found, on a consideration of language and circumstances, that there was no such direction and dismissed the husband's contention that the word "any",[47a] modifying "bonds, stocks or debentures" in Item I included all securities she might own, the court limiting the securities to those actually in her possession as distinguished from those in possession of the trust company.

Finally, although, as the court noted, the issue was not properly before it since it had not been raised below, the court declined to permit an "equitable apportionment" which would permit a ratable contribution between Items II and IV to equalize the burden of debts and taxes, and resulting in a tax saving, it being pointed out that nothing in the will indicated any intention to provide for ratable contribution.

Whatever were the consequences, tax and otherwise, and whether intended or unintended, of the phraseology of the will, the will on its face seems so free of refinements, delicate shadings or obscurities that any result other than that which the court reached would have been surprising.

Rules of Construction

Practically every will case which does not involve probate (execution, capacity, etc.), jurisdiction or procedure is one that entails interpretation, or, in a broader sense, construction; and in every such case the rules of construction come into play. No mention may be made of them in some cases but they are at work nevertheless; in other cases some display is made of them, although in no case can it be said that all of them are exhibited; and in other cases the rules figure as prominently as the problem to be solved. So far in this survey every case discussed has been one of construction, and the court with varying degrees of overt reference has resorted to them. In the main the rules are the familiar ones, and no new ones seem to have been introduced except

47. *Quaere*: As between the specific legacy of the securities and the specific legacy of the jewelry, personal effects and furniture, would one abate before the other?

47a. We have met "any" before. See Watson v. Watson, under Ademption.

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possibly the presumption against disinheritance, noted in the discussion of *Rikard v. Miller*,[48] under Ademption. Yet familiar and obvious as they are, the court has felt it necessary in most of the cases already dealt with to emphasize them or some of them again. Thus, in *Padgett v. Black*,[49] there is the statement of the principles that the cardinal rule of construction is to ascertain the intention of the testator; that "in determining the intent * * * and in reaching a proper construction of a will, a primary resort to the words used by the [testator] is required. The inference as to a testator's intent should be such as to leave no hesitation in the mind of the court and must not rest upon speculation or conjecture. The true intent must be gathered from the four corners of the will." In *Watson v. Wall*,[50] it is said "In our search for the testator's intention, by which we must be governed in the interpretation of his will, we must consider words, phrases, clauses and sentences, not separately, but as part of, and in their relation to, the whole instrument." And, in *Rikard v. Miller*,[51] it is stated "It is a fundamental rule that in construing the provisions of a will, the intention of the testator at the time the will is executed, is the primary inquiry of the court. * * * In arriving at the intention of the testator the will must be read and considered as a whole."

The rules themselves occupied a more prominent place than the problem in *Spell v. Traxler*.[52] The action was for specific performance of a land contract. The complaint alleged that the plaintiff, C. A. Spell, had contracted to sell to the defendant a parcel of land owned by him in fee simple; that he had acquired the land by the will of one Anna Prudence Spell; that "Item 3 of said will reads as follows: 'In the event that Henry A. Spell should die before his father, C. A. Spell, it is my will that the executors hereinafter named handle this estate to the one in the family that is most worthy and beneficial.' " The complaint further alleged that after the death of Henry A. Spell the executors had conveyed the land to the plaintiff.

The defendant demurred on the ground that the complaint on its face showed that the plaintiff did not have a fee simple title and thus could not perform the contract. The demurrer

48. 231 S. C. 98, 97 S. E. 2d 257 (1957).
49. 229 S. C. 142, 92 S. E. 2d 153 (1956).
50. 229 S. C. 500, 93 S. E. 2d 918 (1956).
51. 231 S. C. 98, 97 S. E. 2d 257 (1957).
52. 229 S. C. 446, 93 S. E. 2d 601 (1956).

was overruled by the lower court, and this action was sustained on appeal.

In approaching the problem as to the interpretation of the expression "that the executors hereinafter named handle this estate to the one in the family that is most worthy and beneficial," the court said that the following principles were applicable: "1. All rules of construction are directed towards the ascertainment of what the testator intended by the language used in his will, and to the effectuation of that intention if it be consistent with law. * * * 2. The law abhors intestacy[53] and will indulge every presumption in favor of the will. * * * 3. The testator's intention need not be declared in express terms if it can be clearly inferred from particular provisions and from the general scope and import of the will. * * * 4. The testator's intention is to be gathered from the whole instrument, its doubtful language being considered in the light of circumstances known to the testator at the time of its execution. * * * 5. If the testator's intention can be clearly perceived, and is not contrary to some positive rule of law, it must prevail even though it involves the rejection or addition of words or a change in their literal meaning."

The whole will was not set out in the complaint (although improperly included in the transcript and on that account not considered) and the court, upholding the denial of the demurrer, did so on the ground given by the lower court: that the demurrer admitted the allegation of fee simple ownership which was not clearly negatived by the quoted fragments from the will. The court did not undertake to construe the quoted provision since the whole will was not before it, saying that "whatever doubt as to the intention of the testatrix may be occasioned by her use of the quoted expression is to be resolved from consideration of the will as a whole in the light of the principles of construction to which we have referred,

53. This is pretty strong language, particularly when there are considered the presumption against disinheritance discussed in the residue case of Rikard v. Miller and the lack of reluctance on the part of the court there to find partial intestacy, but the language is not uncommon. See 57 AM. JUR., *Wills*, Sec. 1158 (1948): "An intestacy is a dernier resort in the construction of wills, and the abhorrence of courts to intestacy under a will has been likened to the abhorrence of nature to a vacuum." This is certainly appropriate where there is a total vacuum, resulting in the complete nullification of the dispositive provisions of a will — as if a will had not been made —, as was the case of Davenport v. Collins, 161 S. C. 387, 159 S. E. 787 (1931), but whether that revulsion ought to apply to partial intestacy is, at least to the writer's mind, doubtful.

and that the said expression is not upon its face so devoid of meaning or so impossible of interpretation as to render the complaint demurrable."[54]

Contract to Make Will

As in every previous year of the survey the Supreme Court had before it in the period under review a case involving an alleged contract to make a will. Such cases usually turn on contract law as much as, if not more than, the law of wills, and the case of *Dean v. Dean*[55] is no exception. The facts are unusual, in that there was agreement, but only up to a point, and the failure to go beyond it to reach full consummation proved fatal. The action was one to enforce an alleged contract to make a will. The facts were that the mother of the plaintiff and defendants was one of the heirs of her intestate husband and that she and her four children entered into a written agreement whereupon the children assigned to her their income from the inherited real estate, for her life, in order to provide her with ample support, she to carry taxes, insurance and repairs. Another agreement was later prepared and signed by all the children except one, the instrument on its face showing that it was between the mother and all the children, similar to the first agreement but agreeing on the mother's part to devise her interest to her children, with substitutional provisions in the event of the death of any of them. The mother later died, leaving a will devising her property to certain grandchildren.

The master and the circuit judge held against the alleged contract, on the ground that the second contract contemplated the execution by all four children and was a joint one, and that not having been executed by all the anticipated parties it never became effective. The Supreme Court affirmed on the stated grounds. Much of the opinion is taken up with the nature of joint and joint and several contracts (the conclusion here being that it was joint) but it would seem that whether it was one or the other would be a matter of no

54. The buyer could hardly be blamed in this case for rejecting the title, although it might on judicial interpretation turn out to be good, an interpretation which could not be given with finality without all parties having a possible interest before the court — which might not have been the fact here. Schroder v. Antipas, 215 S. C. 87, 51 S. E. 2d 367 (1949). Apparently the defendant fell short at the outset in the manner of his defense. Just what the plaintiff did own will almost certainly have to be judicially determined, unless time will give the merciful healing of adverse possession.

55. 229 S. C. 430, 93 S. E. 2d 206 (1956).

consequence if the condition of signing was — and so it appeared here — that all should sign.

Lord Campbell's Act

The case of *Campbell's Auto Transit, Inc. v. Bass*[56] is reviewed under Pleading and reference to it there will give the essential facts and law. From the Wills point of view, as it relates to executors and administrators, attention need be paid only to the discussion in the case of the function of an executor or administrator with respect to actions for wrongful death and actions under the Survival Act. This excerpt from the opinion points up the vital differences so far as the present case, under its facts, is concerned: "Appellant suggests that the only real differences between the functions of the executrix as representative of the estate on the one hand and as representative of the statutory beneficiaries on the cause of action for wrongful death on the other is in relation to the distribution of the proceeds of recovery in her hands. But the distinction is deeper than that. For example, recovery against her on the cause of action for property damage would not operate to reduce by a penny her recovery on the cause of action for wrongful death. Nor could recovery by her on the cause of action for wrongful death offset her liability under a judgment against her for the property damages. The two clauses — her own against respondent for wrongful death, and respondent's against her for property damage — are in no wise reciprocal. In reality, she functions under two separate and distinct trusteeships having no relation to each other beyond the fact that their origin is referable to the death of the same person."[57]

LEGISLATION

Two important pieces of legislation in the field of Wills were enacted in the 1957 session of the General Assembly. One relates to the age of testators, and the other to the effect of delay of probate of a will upon purchasers and encumbrances.

By Act signed by the Governor on July 15, 1957,[58] Section 19-201 of the 1952 Code was amended to permit married persons of the age of eighteen to make wills. In its amended form the statute reads: "The real and personal property

56. 229 S. C. 607, 93 S. E. 2d 912 (1956).
57. For discussion of the nature of the trusteeship under the wrongful death statutes, see 1956 Annual Survey, 9 S. C. L. Q. 164-166.
58. Act No. 387, 50 Stat. 568.

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of any person may be disposed of by will, but no will of real or personal property shall be valid unless the testator or testatrix, at the time of making thereof, was of sound mind and either of the age of twenty-one years, or married and above the age of eighteen years."

It is to be assumed that some practical considerations dictated the exception in favor of married persons. It is debatable that married persons over eighteen but under twenty-one have greater mental capacity than single persons in the same age group (and some cynics may argue that marriage at such an age indicates the lack of it), but there may be the element of a greater sense of responsibility and the need of permitting a married man or woman to make a suitable disposition of his or her estate to take care of a new and young family. But since requirements as to age are based generally on supposed capacity to understand rather than on other factors, it would have seemed more logical to reduce the age for all persons, married and unmarried, to eighteen — a suggestion made in 1949 by the Committee on Jurisprudence and Law Reform of the South Carolina Bar Association.[59] It recommended that "The same age requirements should be prescribed as to all wills, whether of real or personal property, without regard to sex." It was pointed out that there was no longer any valid distinction between real and personal property, and that the statutory requirement that a testator be twenty-one years to make a will of real property and the non-statutory rule that a valid will of personalty might be made by a female of the age of twelve and by a male of the age of fourteen[60] were substantially inconsistent and unrealistic. A secondary recommendation was that the age be raised in the case of personal property, and reduced in the case of real property, to eighteen. In 1951 the General Assembly — whether because of the recommendation or not is a matter of conjecture — went along at least part of the way by making the same age requirement without regard to sex or character of property, namely, twenty-one.

There are a few — a very few — states that make a distinction between married and single testators. So far as this distinction is adopted in this State, it is, confessedly, all to the good. But married persons under twenty-one still labor

59. 1 S. C. L. Q. 327 (June, 1949).
60. Posey v. Posey, 3 Strobhart Law 167 (S. C. 1848); Major v. Hunt, 64 S. C. 97, 41 S. E. 816 (1901).

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under the same contractual and other disabilities as do unmarried minors,[60a] and it has never been seriously suggested — short of reducing the age of majority below twenty-one — that exceptions be made in this area. Since, however, it has been said that "ordinarily one need not have full contractual capacity in order to make a will"[61] — which is tantamount to saying that it requires less capacity to make a will than a contract — there still seems no valid reason for not making the age requirement eighteen without regard to the single or married state of the testator.

The other legislation which became law without the Governor's signature on June 17, 1957,[62] is an amendment to Section 19-266 of the 1952 Code. In its amended form it is as follows: "Every last will and testament, including any codicil or codicils thereto, shall be null and void as to subsequent purchasers or encumbrances without notice of property devised or bequeathed by the will unless the same be filed for probate in one of the modes allowed by law within six months after the death of the testator."

The change in the statute consists of substituting "six months" for "one year", originally appearing. The amendment is in keeping with the comprehensive legislation of 1956[63] which was designed to facilitate and expedite the administration of estates, particularly by shortening the periods required for the doing of necessary acts.

60a. There is a statutory exception which permits renunciation of dower by a minor wife. CODE OF LAWS OF S. C., 1952 §§ 19-112, 19-113.

61. McCullum v. Banks, 213 S. C. 476, 50 S. E. 2d 199 (1948).

62. Act No. 369, 50 Stat. 547.

63. Act No. 767, 49 Stat. 1785, reviewed in 1956 Survey, 9 S. C. L. Q. 168-178.